TABLE OF CONTENTS
Appendix to Brief

Page

Order of
The Honorable Frederick N. Smalkin
Re: Scheduling Trial
entered December 20, 2001 ..... App. 1

Order of
The Honorable Frederick N. Smalkin
Re: Reopening Case, Denying Defendants' Motion for Summary Judgment and Reinstating Pre-Trial Conference
entered November 6, 2001 ..... App. 22

Order ,
United States Court of Appeals
for the Fourth Circuit
Re: Denying Appellees' Motion to Stay Mandate
entered November 2, 2001 ..... App. 26

UNITED STATES COURT
OFFICE OF THE CLERK
DISTRICT OF MARYLAND

12/20/01

Felicia C. Cannon, Clerk
John A. Cerino, Chief Deputy

To: James P Gillece (aty)
Re: Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)

Case Number: 1:98-cv-02519

Instrument Number: 98

Number of pages including cover sheet: 18

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

POTOMAC ELECTRIC POWER COMPANY
Plaintiffs,

v. **Civil Action No. S 98-2519**

ELECTRIC MOTOR AND SUPPLY, INC., *et al.*,
Defendant

PRETRIAL ORDER
[Entered December 20, 2001]

The parties hereto, through undersigned counsel and pursuant to Rule 106 of the Local Rules of the U.S. District Court for the District of Maryland, hereby jointly file this proposed Pretrial Order.

A. Plaintiff's Brief Statement of Facts and Legal Theories.

1. Facts.

Plaintiff Potomac Electric Power Company ("PEPCO") is a regulated utility company providing electrical power to customers in the greater Washington, D.C. metropolitan area. Defendant Electric Motor and Supply Company, Inc. ("EMS") is an electric motor

Ordered jointly to govern Trial (4 day non-jury) to
Commence Tuesday, May 21st, 2002 at 09:30 a.m.
/s/ JBJ
12/21/2001

repair company located in Altoona, Pennsylvania. Defendant Ralph Force ("Force") is President of EMS, and Defendant Charles Rhodes ("Rhodes") is the Chief Engineer for EMS responsible for overseeing the repair and technical aspects of EMS's work for PEPCO and other customers. From 1985 until 1996, EMS provided motor repair services for hundreds of PEPCO motors as a result of EMS's successful bids on PEPCO's work.

In March of 1994, PEPCO received an anonymous package suggesting that certain of its employees had engaged in fraudulent bid-rigging with certain EMS employees. Based on this anonymous package, PEPCO had one of its security department investigators, Ed Stowe, institute an investigation. Although this investigation initially focused upon alleged bid-rigging and bribes involving PEPCO's employees, the investigation ultimately uncovered EMS's systematically fraudulent repair work on PEPCO motors.

PEPCO had developed a rigorous set of standards for the repair of its electric motors; those standards were among the most demanding in the industry. EMS, through Force and Rhodes, and in order to gain business from PEPCO and profit therefrom, falsely represented to PEPCO that it could and would repair the motors in conformity with the PEPCO standards. EMS then repaired the motors at levels deliberately below the PEPCO standards, and then falsified records to convince PEPCO that the contracts for repairs were fulfilled. EMS fraudulently repaired PEPCO motors on a regular basis for years, and then lied to PEPCO about the repair work actually being performed in its documentation to PEPCO. Specifically, EMS failed to meet PEPCO's specifications

requiring epoxy as the varnish treatment for motors, and that two (2) treatments of Vaccum Pressure Impregnation ("VPI") with epoxy were required. Instead, EMS often used polyester instead of epoxy and provided only a single VPI treatment. In fact, EMS even applied an epoxy coating over the polyester VPI'd motor on occasion in order to make it appear that PEPCO's specifications had been met. In documenting its work to PEPCO, EMS would lie to PEPCO by filling out paperwork, including inspection reports and invoices, that falsely represented that EMS had used epoxy rather than polyester, and that they had performed two (2) VPI treatments when in fact only one had been performed.

In addition, EMS also regularly failed to perform testing on PEPCO's motors as required by PEPCO's specifications. For example, EMS was required to perform polarization index tests for PEPCO motors to confirm the integrity of installation of the motor. The results reported to PEPCO, however, often did not reflect the actual results and sometimes were just flat-out made up by EMS. Likewise, EMS failed to perform surge tests for PEPCO in accordance with PEPCO's specifications, and then lied about the results to PEPCO, as well as lying about the results of AC High-Potential Tests and required electrical calibrations.

Force and Rhodes were not only aware of, but actually controlled and actively participated in these fraudulent repair activities. Thus, EMS, Rhodes and Force engaged in a pattern of fraudulent activity, which created enormous benefit for EMS. Specifically, EMS was able to low-ball on bids to PEPCO in order to obtain the work, but then would not meet PEPCO's high specifications, saving EMS money and damaging

PEPCO by billing PEPCO for services that were not rendered. Profits made from PEPCO were invested by Defendants back into the enterprise to further the business of EMS. Defendants' concealment of their pattern of fraudulent repair of PEPCO motors thus allowed them to continue to receive work from PEPCO and to profit from their wrongdoing, investing that profit back into the enterprise and damaging PEPCO by billing PEPCO for repair services that were not rendered.

2. Legal Theory.

PEPCO seeks recovery under the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. § 1962(a). PEPCO will show that Defendants derived income from intentionally engaging in fraudulent activities in their subpar repair of PEPCO electric motors and falsified records to cover up such fraudulent activity, then reinvested the income into EMS's business for the continuation of the enterprise. PEPCO will also show that it was injured as a result of Defendants' fraudulent activities . See 18 U.S.C. sec. 1962 (a); Mid Atlantic Telecom, Inc. v. Long Distance Servs., Inc., 18 F.3d 260 (4th Cir. 1994); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); In re American Honda Motor Co., 958 F.Supp. 1045 (D.Md. 1997).

B. Defendant's Brief Statement of Facts and Legal Theories.

1. Facts.

Defendant EMS is a small, privately owned electric motor repair shop. EMS has been in business since 1956. EMS has one small plant which is located in

a residential neighborhood in Altoona, Pennsylvania. Defendant Ralph Force, the 79 year old President of EMS has worked in the electric motor repair business for five (5) decades. Charles M. Rhodes, is EMS' chief engineer and has been associated with EMS during the entire period relevant to these allegations. Like Mr. Rhodes, most of EMS' employees have been associated with EMS for many years. The physical plant itself has housed the company for many years. Because it has been fortunate enough to have a stable, efficient work force and due its location in a rural area of Pennsylvania, EMS has been favored with a stable, efficient and long tenured work force. The Company's stability and location in an economically favorable environment together with the aged physical plant have contributed to EMS' ability to maintain low overhead. As a consequence EMS has been able to obtain work as a low bidder on many electric motor repair jobs sent to them by customers. EMS' work has consistently met very high quality standards. In the normal course of its work EMS warrants its repairs work for a period of one (1) year. Over its many years of work, EMS has had very few returns. In the instant case, EMS repaired literally hundreds of PEPCO motors over a 14 year period. Critical to the Defendants' case and fatal to Plaintiff's claims is the dispositive fact that despite the scurrilous charges leveled by PEPCO against EMS not a single motor repaired by EMS for PEPCO in the fourteen (14) year period of their business relationship is reported to have failed in service for reasons related to repairs or service provided by EMS. In discovery, PEPCO was unable to identify a single PEPCO motor that had failed prematurely, or for that matter failed at all as a result of any act or omission of EMS.

EMS categorically denies that it defrauded PEPCO in any way or that it failed to adhere to PEPCO specifications. EMS' employees carefully and diligently repaired each of PEPCO's motors in conformity with PEPCO's specifications. In an age when technological advancements have been made in virtually every discipline, the development of and evolution of electric motors has remained relatively stagnant. Electric motors of all shapes, sizes and deigns are fundamentally similar and simple. In, service the motors either work when connected or not. There is no middle ground. If the repair to the motor has not been properly performed the motor will likely not operate at all when tested and/or placed into service. The best proof of the quality of EMS' work is that none of the motors repaired by EMS has failed or required additional maintenance even though the last motor repaired by EMS for PEPCO was fixed in 1996.

While PEPCO has alleged falsified records, EMS denies the allegation. EMS accurately recorded interim test results performed by its workers on the motors using internal worksheets. Final test results were recorded on the forms supplied by PEPCO. Because tests of motors in the EMS shop were conducted at different stages of motor repair, test results do not necessarily coincide. PEPCO's assertion that the final test results were falsified is based on its erroneous belief and lack of understanding that internal test results performed on motors which were not fully assembled should reveal the same test results as the results obtained on fully repaired electric motors. Similarly, PEPCO's assertion that "burn" records and "bake" records were also falsified also demonstrates PEPCO's fundamental misunderstanding of the repair

process. In fact there were duplicate copies of oven tests results in machine repairs files. The reason for duplication of certain records is that the ovens used by EMS which produces each of the records accommodate more than one motor, such that each chart for each oven actually documents reports relating to several motors being "baked" or "burned" simultaneously.

Nor is the fact that EMS' time records sometimes reflects "0.0" hours for work done on the motors, proof of any fraud. All of PEPCO's work was done on a fixed-price basis. EMS workers often multi-task - - working on other motors while the first motor was in being "baked" or "burned" in an oven or VPI tank. In such circumstances, a worker might choose to record time on a second motor. It simply did not matter to EMS workers, how records were done since PEPCO jobs were not billed on a time and materials basis, but rather on the basis of a fixed price.

EMS will demonstrate how the motors were repaired and how the documents were handled. PEPCO will not be able to show that any fraud occurred, much less any form of racketeering.

2. Legal Theories and Issues.

The only issues left on remand relate to liability. In prior rulings this Court found that PEPCO had no actual damages, and the Fourth Circuit has since affirmed that portion of this Court's decision. ("The District Court correctly found that PEPCO adduced no evidence that any motor repaired by EMS failed or had not performed as well due to EMS' claimed fraud." Slip. Op., at 5). The Fourth Circuit remanded the case solely for the purpose of providing PEPCO with an

opportunity to adduce evidence supporting its liability claim and, if so, to make claim for nominal damages. ("Thus, we conclude that the district court erred in granting summary judgment on the basis of inability to prove the amount of damages; if the motors were not repaired according to PEPCO specifications. *Some* amount of damage likely is present, even if PEPCO cannot prove the amount, and a nominal amount of damage is adequate to support liability. Slip. Op. at 8. Emphasis in original.) In this regard, it is worth noting that PEPCO admitted to the Fourth Circuit in oral argument that it had no way to quantify the differences in costs incurred by PEPCO between charges normally paid for repairs made in conformity with PEPCO's specifications and those costs charged by EMS' for alleged non-compliance with specifications. None of the damage exhibits or witnesses identified by PEPCO, (e.g. Mark Sherman), are relevant to the instant proceeding.

By operation of the statute of limitations the time period within which PEPCO must prove its allegations of multiple predicate acts and a pattern of racketeering is from August, 1994 to February, 1996. PEPCO filed its lawsuit on or about until July 29, 1998. This Court has held that, "PEPCO cannot sue for any injuries it claims prior to July 29, 1994." August 30, 2001 Letter to Counsel. Consequently, PEPCO cannot use pre-August, 1994 conduct to prove its claims. Defendants will move to exclude any such evidence.

Defendants understand that PEPCO may seek to introduce evidence of billing disputes EMS may have had with other power companies or customers. These disputes are unrelated to this case and the allegations lodged by PEPCO herein. If admitted, this evidence

will require substantial rebuttal from EMS, resulting in extensive time being spent on such matters which are both collateral and irrelevant to the instant case.

2. **Legal Theories.**

EMS has not violated any of the material provisions of its contract with PEPCO. PEPCO cannot and has not demonstrated that EMS engaged in any wrongdoing, intentionally or otherwise. PEPCO has alleged that EMS's conduct included "Sub par repair" of PEPCO electric motors, an assertion which has absolutely no factual predicate. From the inception of its case PEPCO has demonstrated an astounding level of misunderstanding and lack of familiarity with the repair process. Not a single PEPCO employee involved in the maintenance repair or power generation component of PEPCO's work has identified a single instance in over ten (10) years of association with EMS whenever EMS work failed to meet expectations or specifications.

C. **Counterclaim, Crossclaim or Third-Party Claim.**

No counterclaims, crossclaims or third-party claims have been filed in this matter.

D. **Amendments to Pleadings.**

No amendments to the pleadings are required at this time, although the parties reserve their right to amendment pursuant to Rule 15(a)-(b) of the Federal Rules of Civil Procedure.

E. Issues in the Pleadings to be Abandoned.

No issues in the pleadings are being abandoned.

F. Joint Stipulations of Fact.

PEPCO stipulates to all the facts set forth in the Plaintiff's Brief Statement of Facts, supra.

G. Damages Claimed by Plaintiff.

PEPCO seeks equitable relief plus provable actual and/or nominal damages, costs, expenses and attorneys fees in bringing this action under RICO. PEPCO also seeks such other and further relief as the Court or jury may deem just and proper.

H. List of Plaintiff's Exhibits.

1. Affidavit of Edwin W. Stowe dated October 13, 2000
2. Report of Investigation 8/31/94; Bate Stamp #001318
3. Affidavit of Richard Beegle dated October 11, 2000
4. EMS Purchase Order No. SN014892-000-00-EK, dated January 5, 1994
5. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated January 3, 1994
6. EMS Electrical Test Data Sheet; Serial No. LY461005, Req. 55440

7. EMS Work Order for No: 50351; from 12/30/93 to 1/6/94
8. EMS Invoice dated 1/17/94; Invoice No. 357351
9. EMS Purchase Order CC822487-000-00EK; dated January 14, 1994
10. EMS letter from Charles M. Rhodes to Mr. Bill Wolters, dated January 10, 1994.
11. EMS Electric Test Data Sheet, Serial No. X323219AZ-EV, Req. 7252
12. EMS Work Order for No: 50392; from 1/10/94 to 1/24/94
13. EMS Invoice dated 1/31/94; Invoice No. 357604
14. EMS Purchase Order No. BK012767-030-00-EK
15. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated March 1, 1994
16. EMS Electrical Test Data Sheet; Serial No. DNJ413427 Req. No. 55656
17. EMS Work Order for No: 50700; from 2/18/94 to 4/15/94
18. EMS Invoice dated 4/29/94; Invoice No. 359114
19. EMS Purchase Order No. BK012767040-00-EK, dated July 28, 1994
20. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated July 26, 1994
21. EMS Electrical Test Data Sheet; Req. 55911
22. EMS Work Order for No: 51902; from 7/25/94 to 7/28/94

23. EMS Invoice dated 8/12/94; Invoice No. 360790
24. EMS purchase order number BK012767-041-00-EK dated August 5, 1994
25. EMS letter from Darryl E. Price to PEPCO's Francis Savoy, dated August 18, 1994
26. EMS Electrical Test Data Sheet Req. 55929
27. EMS Work Order for 52028 from 8/9/94 to 9/14/94
28. EMS Invoice dated 9/21/94, Invoice No. 361411
29. EMS Purchase Order BK012767-044-00-EK dated September 27, 2994
30. EMS letter from Darryl Price to PEPCO's Richard Kessler dated September 9, 1994.
31. EMS Electrical Test Data Sheet Req. 33795
32. EMS Work Order 52182 from 9/7/94 to 10/26/94
33. EMS Invoice dated 11/2/94 Invoice No. 362097
34. EMS Purchase Order CC824313-000-00-EK dated January 6, 1995
35. EMS letter from Steve Peterman to PEPCO's Betty Johnson dated December 28, 1994
36. EMS Electrical Test Data Sheet indicating other epoxy P.D. George E900 two treatments.
37. EMS Work Order for 52944 from 12/29/94 to 1/10/95

38. EMS Invoice dated 1/13/95, Invoice 362949
39. PEPCO Report of Investigation dated August 31, 1994 signed by Edward W. Stowe
40. Letter from Keith Flohr to Edwin Stowe; Dated December 10, 1999 Re: Examination and Testing of Insulating Polymers
41. PEPCO Property Protection Department Property Receipt
42. Keith W. Flohr Resume
43. Keith W. Flohr record of Court appearances over the last four years
44. Letter from Keith W. Flohr to Edwin Stowe; Dated October 23, 1995; Re: Analysis of Resin: Station C, 3A Boiler Feed Pump, S/N 106481 and attached charts
45. Letter from Keith W. Flohr to Edwin Stowe; Dated January 30, 1996; Re: Examination of Sample of Plastic for Visible Flow of Marks
46. Letter from Keith W. Flohr to Edwin Stowe, Dated October 23, 1995; Re: Analysis of Resin: 4BFD Fan Motor Stator Scraping and attached chart
47. Letter from Keith W. Flohr to Edwin Stowe, Dated October 23, 1996; re: Analysis of Resin: 4AFD Fan Motor Stator Scraping and attached charts.

48. Letter from Keith W. Flohr to Edwin Stowe, Dated April 6, 1995; re: analysis of resin; Circulator Water Pump #2B, EWS 4-5-95 and attached chart.
49. Letter from Keith W. Flohr to Edwin Stowe, Dated March 30, 1995; Analysis of Resin: Circulator Water Pump #1A, SN#1L134511 and attached charts.
50. Letter from Keith W. Flohr to Edwin Stowe, Dated march 30, 1995; Analysis of Resin: Circulator Water Pump #2B, SN 4L34511 and attached charts.
51. Letter from Keith W. Flohr to Edwin Stowe, Dated July 11, 1994, Analysis of Six Varnish Samples. Confirmation of Telephone Report and attached charts and Property Protection Department Property Receipt
52. PEPCO Order Number CC822995-000-00-GG; dated November 2, 1994
53. October 11, 1999 Expert Report of Marc Sherman, including exhibits thereto.
54. All other Inspection Reports and invoices from EMS to PEPCO produced during discover (such as documents to be more specially identified prior to the commencement of trial)
55. All other internal time entry reports of EMS concerning work on PEPCO motors produced during discovery (such documents to be more specifically identified prior to the commencement of trial)
56. All documents identified by Defendants in section I, infra.

I. **Defendants' Exhibit List.**

a. Complete EMS files for repairs made by EMS to P.O. SN014892-000-00-EK

b. Complete EMS files for repairs made by EMS to P.O. CK822487-000-00-EK

c. Complete EMS files for repairs made by EMS to P.O. BK012767-030-00-EK

d. Complete EMS files for repairs made by EMS to P.O. BK012767-040-00-EK

e. Complete EMS files for repairs made by EMS to P.O. BK012767-041-00-EK

f. Complete EMS files for repairs made by EMS to P.O. BK012767-044-00-EK

g. Complete EMS files for repairs made by EMS to P.O. CC824313-000-00-EK

h. Complete EMS files for repairs made by EMS to P.O. CC822995-000-00-EK

i. Calibration Certification for testing performance on EMS equipment from E-I-L Instrument, Inc.

j. Calibration Certification for testing performance on EMS equipment from Transcat

k. Photographs of Plant
   - i. Core tester
   - ii. Surge test
   - iii. VPI
   - iv. Bake Oven (Small)
   - v. Bake Oven (Mid-Size)
   - vi. Bake Oven (Large)
   - vii. "Burn-off" Oven
   - viii. HiPot Testing Area
   - ix. Building
   - x. Office Areas of Building

xi. Files Areas
xii. Various Electric Motors in repair

l. Videotape of Plant and Local Environment
m. EMS firm brochure
n. EMS firm brochure

J. **Plaintiff's Witness List.**

1. **Individuals whom Plaintiff expects to present.**

Edwin W. Stowe
Richard Beegle
Robert Samuelson
Trielok Chand Garg

2. **Individuals whom Plaintiff may call if the need arises.**

Charles Rhodes
Ralph Force
Paul Dick
Darryl Price
Marlene Hapney
Terry Querin
Robert Kelly
Harry Johnston
Robert Blakey
Leonard Nimmerrichter
Elizabeth Johnson
William Wolters
Roland Sabacool
Deborah Davis
Any individuals listed by Defendant in section K, infra.

3. **Expert Witnesses whom Plaintiff expects to or may call.**

Keith W. Flohr (Chemist)
Marc Sherman (Certified Public Accountant and Certified Fraud Examiner)
John Morykon (Defendants' Expert Witness)

K. **Defendants' Witness List.**

1. **Defendants expect to call the following witnesses:**

Charles Rhodes
Paul Dick
Stephen Reese

2. **Defendants may call the following witnesses:**

Trielock Chang Garg
Leonard Nimmerrichter
William Wolters
Elizabeth Johnson
Steven Reese
Defendant reserves the right to call any witness(s) identified by Plaintiff

3. **Expert Witnesses Defendant Expects to or may call:**

John Morykon
Charles M. Rhodes (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)
Paul Dick (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)
Steven Reese (Designated only to the extent that he will testify about processes and procedures employed by EMS. He will offer testimony based on his training, experience and function. He is not an expert witness as defined by the Federal Rules of Civil Procedures.)

L. **List of Depositions to be Offered into Evidence.**

1. **Plaintiffs.** Plaintiff will offer in their case in chief portions of the depositions of any of the witnesses listed in subsection J or K, supra, in the event those individuals are unavailable for trial.

2. **Defendant.** Defendants will offer in their case in chief, Deposition excerpts from T.C. Garg; Leonard Nimmerrichter; Edwin Stowe; William Wolters; Geroge Unkle and Elizabeth Johnson.

M. Other Pretrial Relief.

The parties do not request any other pretrial relief at this time.

Respectfully Submitted,

/s/ James P. Gillece, Jr.
James P. Gillece, Jr.
Robert R. Niccolini
McGUIREWOODS LLP
7 St. Paul Street
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Electric Motor & Supply, Inc.

/s/ Bruce L. Marcus
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Marcus & Bonsib
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770-1405

Attorney for Defendant Force

SO ORDERED THIS _____ DAY OF DECEMBER 2001.

_____
The Honorable
Frederic N. Smalkin
United States District Court
District of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

POTOMAC ELECTRIC POWER CO.

v. Civil No. S 98-2519

ELECTRIC MOTOR AND SUPPLY, INC., *et al.*

ORDER
[Entered: November 6, 2001]

The Court, having been informed that the United States Court of Appeals has declined to stay its mandate pending Supreme Court review, hereby ORDERS, this 6th day of November, 2001:

1. That this case BE, and it hereby IS, REOPENED;
2. That defendant's motion for summary judgment on the ground of insufficient proof of fraud subsequent to the commencement of the limitations period BE, and it hereby IS, DENIED, for the reasons stated in the Court's Letter Order to counsel, dated August 30, 2001, a copy of which is appended hereto and adopted herein;
3. That the pre-trial conference in this matter BE, and it hereby IS, REINSTATED for December 20th, 2001, at 09:30 a.m.; and
4. That the Clerk notify counsel of the entry of this Order

\s\ Frederick N. Smalkin
Frederick N. Smalkin
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERICK N. SMALKIN
UNITED STATES
DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MD 21201
(410) 962-3840

August 30th, 2001

LETTER TO COUNSEL

Re: PEPCO v. EMS, Civ. No. S 98-2519

Dear Counsel:

I have now read and considered the supplemental briefs you submitted on the limitations/fraud question left open by the Fourth Circuit in its recent consideration of this case on appeal. No oral hearing will be held.

Upon review, I am of the opinion that, as a matter of law, PEPCO was sufficiently on notice of EMS's alleged fraud as of April 21, 1994, to commence the running of the statute of limitations under the *Klehr* rule. I reach that conclusion based on paragraph 9 of the Stowe/Brain internal report of investigation, dated August 31, 1994, which clearly indicated that Mr. Beegle told PEPCO personnel, on that date, that repairs contracted for by PEPCO were not being performed as per the contract, even detailing the use of polyester *versus* Epoxy VPI, one of the major constituents of the fraudulent practices alleged in the complaint, and pointing out other incidents of non-compliance with

contract specifications by EMS (some in collusion with PEPCO employees) involving "motors for repairs which had not been done even though PEPCO had been billed for the repairs," which is the issue at the heart of the fraud allegations here.

Because the plaintiff was on notice of the fraud from and after April 21, 1994, as defendant has put it in its most recent brief, "PEPCO cannot sue for any injuries it claims EMS caused prior to July 29, 1994, which is four years prior to the filing of the complaint.

My review, however, of the complaint, shows numerous allegations of fraudulent billings after July 29, 1994, and my review of the discovery materials shows sufficient evidence of fraud to generate a triable issue as to the occurrence thereof with regard to a number of specific motors that were repaired after July 29, 1994, each allegedly constituting a predicate act of mail fraud. Specifically, the Beegle testimony and the discrepancies between internal records and billing documents are sufficient evidence in this regard to withstand summary judgment. The Beegle testimony, even though it relates to periods before the expiry of the statute of limitations, is not thereby rendered inadmissible, as it purports to establish a routine habit or practice of the defendant with regard to PEPCO motor repairs. *See* Fed.R.Civ.Evid. 406. The significance of the documentary discrepancies is, as the Fourth Circuit noted, clearly a matter of factual dispute incapable of resolution here.

For the stated reasons, the defendant's motion for summary judgment on the ground of insufficient proof of fraud subsequent to the commencement of the limitations period is hereby denied.

A pre-trial conference will be held on Thursday, December 20, 2001, at 9:30 a.m. In the interim, I wonder if you would confer amongst yourselves to see if reference of this case to a neutral judicial officer for settlement/mediation might be useful.

Although informal in format, this is nonetheless an Order of the Court, and will be so docketed and filed.

Very Truly Yours,

/s/ Frederick N. Smalkin
Frederick N. Smalkin
U.S. District Judge

FNS/fns
cc: Court File - original
Addressees

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2452(L)
(CA-98-2519-S)

POTOMAC ELECTRIC POWER COMPANY,
Plaintiff-Appellant,

v.

ELECTRIC MOTOR AND SUPPLY, INCORPORATED; RALPH FORCE; CHARLES M. RHODES,
Defendants-Appellees,

and

DARRYL PRICE,
Defendant.

[Entered: November 2, 2001]

ORDER

Appellees/cross-appellants have filed a motion for stay of mandate pending petition for certiorari.

The Court denies the motion. The reason for the denial is that the Supreme Court's decision in Cedric Kushner Promotions, Ltd. v. Don King, 121 S. Ct. 2087 (2001) has made the decision in Bushby v. Crown Supply, Inc., 896 F. 2d 833 (4th Cir. 1990) rule non-determinative of the outcome in cases of this sort.

Entered at the direction of Judge Williams with the concurrence of Judge King and Judge Gregory.

For the Court

/s/ Patricia S. Connor
Patricia S. Connor
CLERK